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No. 99-834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DOINALD E. CONLEY,

Petitioner,

v.

PITNEY BOWES, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner: Donald E. Conley

Respondents: Pitney Bowes Inc.; Pitney Bowes Long Term Disability Plan; George B. Harvey and Carmine F. Adimando, Trustees of Pitney Bowes Long Term Disability Plan; Pitney Bowes Group Life Insurance Plan; Pitney Bowes Major Medical Expense Plan; and Michael Critelli.

Rule 29.6 Statement: There are no parent, subsidiary, or affiliate corporations of Respondents that have issued shares to the public.

This Brief in Opposition is filed on behalf of all Respondents.

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OPINIONS BELOW

Respondents offer the following to clarify the misstatement of Petitioner in his statement of the opinions below. The opinion of the Eastern District of Missouri was rendered on July 30, 1997, and is published at 978 F. Supp. 892. The opinion of the Eighth Circuit Court of Appeals was rendered on May 7, 1999, and is published at 176 F.3d 1044. The petition for rehearing and rehearing en banc was denied on June 24, 1999. All three of these decisions are reprinted in the Appendix to the Petition for Certiorari.

STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete, and in some cases, misleading. Furthermore, Petitioner improperly uses the Petition to reargue facts presented to and decided by the courts below. Respondents, therefore, offer their own statement of the case.

This case arose out of Petitioner's claim for benefits under the Pitney Bowes Long Term Disability Plan ("Plan"). The Plan is an ERISA-governed employee benefit plan, sponsored by and administered by Pitney Bowes. This lawsuit followed the Plan's decision to terminate Petitioner's disability benefits because he no longer met the Plan's requirement of total disability to be eligible to receive benefits from the Plan.

Petitioner claimed injuries from a minor automobile accident that occurred while he was working for Pitney Bowes. Appendix[1] at 2a. Petitioner was determined to be eligible for short term disability benefits and then was placed on long-term disability status. *Id.* A Plan participant may qualify for long term disability benefits after a "qualifying period" of 22 weeks of short term disability. Such a participant will thereafter remain entitled to long term disability benefits as long as the person remains "totally disabled." The Plan requires a participant to provide ongoing proof of disability.

The Plan's definition of "total disability" includes an "own occupation" standard for the first 12 months of eligibility and a stricter "any occupation" standard thereafter. The Plan states as follows:

> 2.20 Totally Disabled or Total Disability shall mean that the Participant is unable to perform his own

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[1] Citations to the Appendix refer to the opinions of the lower courts, reprinted in Petitioner's Appendix to his Petition for Certiorari.

> occupation for a maximum period of twelve (12) months after the Qualifying Period and that thereafter he is unable, because of injury or illness, to engage in any gainful occupation or profession for which he is, or could become, reasonably suited by education, experience, or training . . . .

Appendix at 23a.

Petitioner was denied benefits after the initial twelve month period because the Plan determined that he did not qualify for benefits under the more stringent "any gainful occupation" standard provided in the Plan. Appendix at 23a. The Plan's decision was supported by substantial evidence, including the reports of several physicians who examined Petitioner, suggesting that there was no objective medical basis for Petitioner's complaints of pain. The district court's Findings of Fact fully describe the evidence before the Plan decisionmaker, and Respondents respectfully direct the Court's attention to that decision for a full recitation of the evidence. Appendix at 13a-31a.

After denial of his claim for long term total disability benefits, Petitioner did not ask for an appeal of the Plan's determination, and no administrative appeal ever occurred. Therefore, the Plan's Disability Department's decision became, in effect, the Plan's final determination regarding plaintiff's claim.

Petitioner filed this lawsuit in February 1992. This was several months after the Plan had notified him, in April 1991, that his disability benefits had been terminated because he was no longer, under the Plan's definition, "totally disabled" for any occupation. Appendix at 20a. Respondents moved for summary judgment on the ground that Petitioner had failed to exhaust his administrative remedies. The district court (Judge Stephen Limbaugh) granted Respondents' motion for summary judgment. Petitioner appealed, arguing that the Plan's April 1991 denial notice was defective in that the letter itself did not describe

Petitioner's Plan appeal rights.

In a split decision, the Eighth Circuit Court of Appeals reversed, holding that, under the circumstances, Petitioner was not required to exhaust his administrative remedies before filing his lawsuit. *Conley v. Pitney Bowes,* 34 F.3d 714 (8th Cir. 1994). Therefore, the court held Respondents could not use plaintiff's failure to exhaust as a defense. Because that defense had been the basis for summary judgment, the Eighth Circuit reversed and remanded.

On remand, the case was tried as a bench trial before Judge Donald Stohr. As the Eighth Circuit found, the district court "reviewed the plan administrator's decision to deny benefits, considering only the administrative record that existed at the time of the plan administrators' decision, and concluded that the denial was reasonable and supported by substantial evidence." Appendix at 3a. The Eighth Circuit also stated that the district court mentioned "if it were to review the evidence *de novo*, including some that the plan administrators did not have before them, the court itself would conclude that Mr. Conley's alleged injury lacked believability and that he did not meet the requirements for additional long-term disability benefits under the plan." Appendix at 3a.[2] The Eighth Circuit affirmed the decision of the district court.

In his Statement of the Case, Petitioner makes several unfounded and unsupported allegations disguised as facts. Petitioner states, without support or explanation, that Respondents "did not meet the requirements of their own plan or the Secretary's regulations." Petition at 6. In so stating, Petitioner seemingly

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[2] As an example of Petitioner's credibility problems, Petitioner complained that his foot "turned out" after the accident and remained permanently turned out since the date of the accident. However, subsequently, he was unable to identify which foot had turned out.

alleges that Respondents failed to give Petitioner an opportunity to submit additional information to the Plan for its consideration. This is simply untrue. After remand by the Eighth Circuit, Respondents requested a stay from the district court for the express purpose of permitting Petitioner to submit additional evidence and to allow the Plan to consider such evidence. Petitioner opposed such motion and expressed no interest whatsoever in the offered opportunity to present additional information to the Plan. The Motion for Stay was denied by the district court. Thereafter, despite his earlier opposition, Petitioner was permitted to submit additional evidence at trial in support of his claim for benefits. Respondents complied with the Plan requirements and those requirements imposed by the Secretary of Labor and the district court.

Petitioner's characterizations to the contrary notwithstanding, Petitioner's claim for disability benefits was given a fair and reasonable review and the Plan's decision was based on substantial information in the Plan's administrative record. Both the district court and the Eighth Circuit Court of Appeals have so held. This Petition should be denied.

REASONS FOR DENYING THE WRIT

The Petition's fact-intensive claims and mischaracterization of the applicable case law demonstrate the reasons that this Court should not grant certiorari in this case.

I. THE PETITION MISCHARACTERIZES THE OPINIONS OF THE COURTS BELOW.

Petitioner alleges several purported bases for granting certiorari. Each of these is without merit. None presents issues which justify this Court's exercise of discretionary review.

Petitioner first argues this Court should grant certiorari because he may "be entitled to some form of relief, even if not a

monetary benefit for himself." This argument is apparently based on Respondents' alleged reliance on "adversarial doctors" in determining Petitioner was not eligible for long term disability benefits. Petition at 8. Petitioner appears to be asserting that because Respondents considered the opinion of a doctor who was also retained in a worker's compensation hearing, Petitioner is somehow entitled to relief separate and apart from any benefits claim. However, Petitioner fails to specify the type of relief sought or the legal authority under which he could seek such relief. Instead, Petitioner purports to rely on this Court's grant of certiorari in *Herdrich v. Pegram*, 154 F.3d 362 (7th Cir. 1998), *cert granted*, 68 USLW 3175 (U.S. Sept. 28, 1999), for the proposition that he should be permitted to seek some type of relief beyond his claim for benefits. *Herdrich* is of no assistance to Petitioner.

In *Herdrich*, a plan participant sued for breach of fiduciary duty alleging that "defendants breached their fiduciary duty to plan beneficiaries by depriving them of proper medical care and retaining the savings resulting therefrom for themselves." *Id.* at 366. In reviewing whether it was proper for the district court to dismiss the lawsuit, the Seventh Circuit discussed whether an incentive program in a health maintenance organization can rise to the level of breach of fiduciary duty. The court also reaffirmed the well-established ERISA law that "plan beneficiaries have standing to bring an action on behalf of the plan itself to recoup monies expended in violation of ERISA." *Id.* at 380. "'The fiduciary duties set forth in § [1109] run only to the plan, and not to individual beneficiaries.'" *Id.* (*citing Harsch v. Eisenberg*, 956 F.2d 651, 657 (7th Cir. 1992)).

The plaintiff in *Herdrich* was seeking relief on behalf of the plan for systematic wrongdoing by the Plan fiduciaries. By contrast, Petitioner in this case sought relief only for his own benefit. The Eighth Circuit found that Petitioner was seeking disability benefits and did not state a claim for plan-wide relief.

Appendix at 4a-5a (noting that Petitioner cannot maintain "an action for planwide relief under § 1132(a)(3)(A), since . . . he has not pleaded a systematic error or abuse in need or reform"). There is nothing in *Herdrich* which would indicate that the Petitioner in this case can maintain a claim for anything other than benefits.

Petitioner also attempts to characterize the decision of the Plan as based solely on the opinion of Dr. Phillips, a board-certified neurologist who also performed an assessment for purposes of Petitioner's worker's compensation claim. Respondents contest the characterizationof Dr. Phillips as a "worker's compensation defense hack" "who enjoys no reputation for fairness and accuracy," and dispute Petitioner's contentions that the insurance company involved in his retention "did not find the doctor or his evaluation credible or accurate." Petition at i, 1, and 4. These statements are inaccurate and unsupported by the record. Neither of the lower courts made any such findings and in fact the district court, sitting as trier of fact, expressly found Dr. Phillips to be credible. Appendix at 28a-29a.

Furthermore, the district court repeatedly stated, and the Eighth Circuit affirmed, that the Plan's decision in this case was based on a variety of factors and substantial evidence. The district court held that it did not even have to determine the appropriate standard of review in this case because "under any of the potentially applicable standards . . . the Court would uphold the determination that plaintiff is not entitled to benefits under the Plan." Appendix at 28a. The Eighth Circuit affirmed this holding:

> There was, however, considerable evidence in the record besides Dr. Phillip's report to support the finding that Mr. Conley was not totally disabled as defined by the plan. The trial court was in the best

> position, moreover, to judge the credibility of Mr. Conley's testimony with respect to pain.

Appendix at 6a.

Petitioner cites no case law to support his position that the lower courts or the plan administrator erred in considering, *inter alia*, the opinion of a doctor who was also retained in a worker's compensation case. Petitioner is not arguing that there is a conflict of law: he is complaining of determinations of fact made by the lower courts. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Thus, Point I of the Petition does not present an issue appropriate for this Court's review.

In his second point, Petitioner argues that the district court acted improperly when it "relied heavily" on evidence offered by the Plan that was outside of the Plan's administrative record. Contrary to Petitioner's assertion, however, the district court never stated that it relied on outside evidence presented by the Plan. In fact, the district court first stated that it agreed with the Plan's disability determination when it reviewed only that evidence presented to the Plan decisionmaker at the time of the initial determination. Appendix at 29a. The court then commented that "this same conclusion would only be further bolstered were the Court to consider the evidence offered by both parties beyond that which was part of the administrative record." *Id.* Therefore, the district court did not improperly rely on outside evidence in affirming the decision of the Plan. Moreover, the Eighth Circuit expressly noted that the trial court had not improperly considered outside evidence. Appendix at 8a. Even had such evidence been improperly admitted, Petitioner has not been harmed by the admission of such evidence.

Furthermore, the case law recognizes that there are instances in which it is appropriate for the court to permit a plan to submit additional evidence. In the present case, the Eighth Circuit

recognized that outside evidence can be considered when there is good cause to depart from the general rule. Appendix at 8a. *See, e.g., Perlman v. Swiss Bank Corporation Comprehensive Disability Protection Plan*, – F.3d –, 1999 WL 989387 (7th Cir., Nov. 2, 1999) (discussing instances when additional evidence is appropriate and citing case law from several circuits). Even the case Petitioner purports to rely on, *Friedrich v. Intel Corporation*, 181 F.3d 1105 (9th Cir. 1999), recognizes that there are occasions in which the court may admit additional evidence from the plan. There is no reason in this case to disturb the Eighth Circuit's finding that the additional evidence was properly admitted.

In sum, even if this Court wishes to review the propriety of the admission of extrinsic evidence by the Plan Administrators, this is not the case in which such a review is necessary or appropriate.

II. THE OPINIONS BELOW DO NOT CREATE A CONFLICT AMONG THE CIRCUITS.

Petitioner claims that the Eighth Circuit's opinion in this case "ignores this Court's recognition of Social Security determinations in *Cleveland v. Policy Management Systems Corporation*, 119 S.Ct. 1597 (1999)." Petition at 10. Petitioner further argues that the Eighth Circuit's opinion demonstrates the conflict among the circuits' treatment of Social Security determinations and ERISA plan disability determinations. *Id.* Neither of these contentions is meritorious and this Court should not grant certiorari based on either argument.

First, the Eighth Circuit did not "ignore" this Court's opinion in *Cleveland*. As a threshold matter, *Cleveland* was decided three weeks after the Eighth Circuit's opinion in the instant case. More important, *Cleveland* is distinguishable from the present case in many respects. In *Cleveland*, plaintiff brought suit against her former employer under the Americans with Disabilities Act. Cleveland's employer argued that she was estopped

from pursuing an ADA claim that she was able to work, because she had previously applied for Social Security Disability Insurance, claiming that she was unable to work. Rejecting the employer's argument, this Court noted that there were situations "in which an SSDI claim and an ADA claim can comfortably exist side by side." *Cleveland,* 119 S.Ct. at 602.

In this case, Petitioner seeks to extend the reasoning in *Cleveland* to require Plan decisionmakers to defer to the rulings of the Social Security Administration. *Cleveland* is simply not relevant to the present inquiry. This is a case about the decision of an employee benefit plan, based on interpretation of the Plan document and applicable claim file. This is not a case of applying two apparently conflicting statutory schemes, *i.e.,* the ADA and Social Security Act. If *Cleveland* is relevant to the present inquiry at all, it serves only to bolster Respondents' position that the Social Security Administration and the Plan decisionmaker are permitted to reach differing conclusions regarding whether an individual is disabled.

Petitioner curiously states that the Eighth Circuit's opinion "would not require the respondents who instructed petitioner to apply for social security benefits . . . to explain why, with plan definitions substantially the same as that used by the SSA, they do not accept or give significant weight to the SSA determination." Petition at 10. In this case, however, the Eighth Circuit properly found that the line of Social Security cases cited by Petitioner was not relevant to the instant case because the Plan's eligibility requirements made no reference to a claimant's Social Security eligibility. Furthermore, none of the cases cited by Petitioner, nor any found by Respondent, suggest that any circuit confers such a requirement on the Plan decisionmaker in the absence of any Plan language to the contrary. Petitioner cites *Perlman v. Swiss Bank Corporation Comprehensive Disability Protection Plan, supra,* and *Whatley v. CNA Insurance Companies,* 189 F.3d 1310 (11th Cir. 1999), as examples of this

requirement, and as purportedly in conflict with the Eighth Circuit holding here. But in *Perlman* the court held that the determination of the Social Security Administration was not binding on the Plan and made no mention of a requirement of explanation as to why the Plan was disagreeing with the Social Security Administration decision. In *Whatley*, the Court merely mentioned that the decision by the Social Security Administration was not binding on the Plan but that the Court could consider such a determination in reviewing the Plan's decision. Neither of these cases are in conflict with the lower courts in this case. Neither supports Petitioner's request that the Court expand the holdings in these cases.

CONCLUSION

For the reasons stated herein, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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